STATE OF MICHIGAN

COURT OF APPEALS

DILLON HOEFT and REBECCA MCCOY,

Plaintiffs-Appellants,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 21, 2020

No. 348649
Genesee Circuit Court
LC No. 16-107029-NF

Before: SWARTZLE, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs, Dillon Hoeft and Rebecca McCoy (Hoeft's mother), appeal by right the trial court order granting defendant, Progressive Michigan Insurance Company, summary disposition under MCR 2.116(C)(10). For the reasons stated in this opinion, we reverse and remand for further proceedings.

I. BASIC FACTS

In July 2008, Hoeft, a pedestrian, was stuck by a motor vehicle driven by Progressive's insured, Kara Thompson. At the time, Hoeft was 12 or 13 years old, and no one in his home owned a vehicle. Accordingly, pursuant to MCL 500.3114, Hoeft sought personal protection insurance (PIP) benefits under Thompson's no-fault policy, which was issued by Progressive. Between 2008 and June 20, 2015, Hoeft received and Progressive paid for daily 24-hour attendant care. The attendant care was provided primarily by his mother, but at times he would be cared for by his stepfather, his sister, or his grandmother. However, in 2015, following a medical examination by a doctor hired by Progressive, Progressive determined that Hoeft did not require attendant care as a result of the accident, so it terminated his attendant-care benefits effective June 20, 2015.

In June 2016, Hoeft and his mother filed a complaint against Progressive based on Progressive's failure to pay for daily 24-hour attendant-care benefits. In April 2018, Progressive moved for summary disposition under MCR 2.116(C)(10). Progressive asserted that Thompson's no-fault policy contained a fraud-exclusion clause permitting it to deny coverage "for an accident or loss if . . . a person seeking coverage has knowingly concealed or misrepresented any material

fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim."[1] Progressive argued that Hoeft represented that his mother and stepfather had provided 24-hour attendant care, but surveillance conducted in October/November 2016 and August/September 2017 and other records from June 2016 demonstrated that the 24-hour attendant care could not have actually been performed on specific dates. In support of its motion, Progressive attached (1) a number of attendant-care sheets that were signed by Hoeft's mother, which indicated the attendant-care she was attesting to was performed by either her or Hoeft's stepfather, (2) surveillance reports from October/November 2016 and August/September 2017, and (3) notes from Hoeft's job coach that suggested Hoeft did not receive attendant care on specific dates in June 2016.

In response, Hoeft and his mother argued that the attendant-care forms were not filled out contemporaneously, that they were "guesstimates," and that in addition to Rebecca and Brian, attendant care was being provided by other individuals, including Hoeft's girlfriend and sister. They added that Progressive had requested that they fill out the attendant-care forms over a year after the present litigation commenced and noted that the surveillance records were not turned over during discovery despite a specific request for any surveillance records. In support of their contentions, Hoeft and his mother directed the trial court to Hoeft's mother's testimony regarding the preparation of the attendant-care forms, the language used on the attendant-care forms, and the timing of Progressive's request for attendant-care records, which occurred after Progressive stopped paying attendant-care benefits in June 2015. Following oral argument, the trial court entered an order granting summary disposition to Progressive after determining that there was no genuine issue of material fact relating to Hoeft and his mother's alleged fraud.

This appeal follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Hoeft and his mother argue that the trial court erred by granting summary disposition under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing

[1] Progressive failed to plead fraud as an affirmative defense. See *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017) ("Reliance on an exclusionary clause in an insurance policy is an affirmative defense."). Further, Progressive did not seek leave under MCR 2.118(A) to amend its answer to the complaint. Failing to raise an affirmative defense as required by the court rules constitutes a waiver of that defense. *Baker v Marshall*, 323 Mich App 590, 595; 919 NW2d 407 (2018); MCR 2.111(F) (stating that affirmative defenses are waived if not asserted in a responsive pleading or amended responsive pleading). Yet, as this issue was not raised in the proceedings below, we conclude that Hoeft and his mother have waived it. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). And, although we have discretion to nevertheless review the issue, *id.*, we decline to do so given that it would have been in the trial court's discretion to permit Progressive to amend its answer to include fraud as an affirmative defense. See MCR 2.118(A)(2).

a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted). A (C)(10) motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, establishes a matter in which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The court may not make factual findings on disputed factual issues during a motion for summary disposition and may not make credibility determinations. *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004).

B. ANALYSIS

Progressive argues that the language in the policy's fraud-exclusion clause "is clear, unambiguous and enforceable against" Hoeft and McCoy, noting that "[t]here is no question that [the fraud-exclusion clause] applies to the Appellants as persons claiming under the policy." Yet, as will be explained below, Hoeft's claim is governed by the statute, not the no-fault policy, and the parties did not address the source of Hoeft's no-fault benefits in the proceeding below. Generally, the failure to raise an issue constitutes a waiver of that issue on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). However, we have the "inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice." *Id*. Here, as the facts are undisputed and the applicable law is clear, we exercise our discretion to review this issue to prevent a miscarriage of justice.[2]

Resolution of this appeal is governed by *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 657; 899 NW2d 744 (2017). In *Shelton*, the plaintiff was injured in a car accident while she was a passenger in a vehicle operated by an individual who was insured by the defendant; the defendant sought to exclude her from receiving PIP benefits based on a fraud provision in the driver's insurance policy. *Id*. at 651. Relying on *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420; 864 NW2d 609 (2014), the defendant argued that the fraud-exclusion clause in the no-fault policy applied to the plaintiff "despite the fact that she is not a policyholder" because "the evidence demonstrate[d] beyond a question of fact that [the plaintiff] engaged in fraud as defined in the policy" when she claimed PIP benefits from the defendant. *Id*.

The *Shelton* Court disagreed and held that "[t]he law governing application of the policy exclusion in *Bahri* is not applicable in this case" because in *Bahri*, the fraud provision applied to the plaintiff, who was the policyholder. *Id*. at 652. In contrast, the plaintiff in *Shelton* "was not a

[2] The failure to plead fraud as an affirmative defense, can be cured by seeking and receiving leave to amend its responsive pleading, MCR 2.118(A). See note 1, *supra*. In contrast, the court's error in applying the fraud-exclusion clause in Thompson's no-fault policy to an individual receiving no-fault benefits pursuant to the no-fault act would result in a miscarriage of justice because it is not a defect that can be remedied by the trial court. Rather, it is a misapplication of the applicable law.

party to, nor an insured under, the policy; she was injured while a passenger, and because neither she nor her spouse or resident relative had a no-fault policy, defendant was required to pay her benefits pursuant to statute, not pursuant to a contractual agreement." *Id*. Analyzing the no-fault priority statute, MCL 500.3114, the *Shelton* Court concluded:

> Under Subsection 1 of the no-fault priority statute, "a [PIP] policy . . . applies to . . . the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ." MCL 500.3114(1) (emphasis added). [Here, the plaintiff] is not an individual named in defendant's policy, a spouse of the person named in the policy, or a relative of either the person named in defendant's policy or his spouse. Therefore, pursuant to the statute, defendant's policy does not "apply" to [the plaintiff]. Rather, [the plaintiff] received no-fault benefits pursuant to Subsection 4, which reads:
>
> > Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim [PIP] benefits from insurers in the following order of priority:
> >
> > (a) The insurer of the owner or registrant of the vehicle occupied.
> >
> > (b) The insurer of the operator of the vehicle occupied. [MCL 500.3114(4).]
>
> Subsection (4) does not state that the owner or operator's insurance policy "applies" to the passenger's claim for benefits, and its text, unlike that of Subsection (1), omits any mention of a [PIP] policy, instead providing that the injured person is to "claim [PIP] benefits from insurers," beginning with "[t]he insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a). [*Shelton*, 318 Mich App at 654-655.]

In sum, in *Shelton*, this Court held that an insured who is not a party to the no-fault policy, but who is eligible for benefits pursuant to the no-fault statutory priority provision, MCL 500.3114, is not subject to the policy's fraud exclusion. *Shelton*, 318 Mich App at 653.

Here, Hoeft was injured while a pedestrian, and because neither he nor his spouse or resident relative had a no-fault policy, Progressive was required to pay him no-fault benefits pursuant to MCL 500.3114(4), not pursuant to Progressive's contractual agreement with its insured. And, as a result, he is not subject to the fraud-exclusion clause included in Thompson's no-fault policy.

Yet, as noted in *Shelton*, a no-fault insurer may deny a claim that it believes to be fraudulent. See *Shelton*, 318 Mich App at 655.[3] A unilateral denial is, however, not the end of the

[3] Denying a specific, fraudulent claim, however, is not the equivalent of voiding a no-fault policy and ceasing to provide any and all no-fault benefits.

matter, but rather merely the initiation of a disagreement that, if suit is brought, must ultimately be resolved by a court. Accordingly, we review whether there was a question of fact with regard to whether Hoeft and his mother committed fraud in connection with the attendant-care claim.

In *Bahri*, 308 Mich App at 424-425, this Court explained the elements of the affirmative defense of fraud in the specific context of PIP benefits:

> To void a policy because the insured has wilfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. [Quoting *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997).]

Here the first allegation of fraud is premised on Hoeft's mother's statement that she provided 20 hours of attendant care on June 20, 2016 and 24 hours of attendant care on June 21, 2016. Progressive contends that this statement was false. As support for the claim, Progressive relies on two job coaching evaluation forms filled out by Hoeft's job coach on June 21 and June 22, 2016. On the June 20, 2016 form, the job coach wrote "no show he was in JAIL" and "mother said he went Fishing Last night and hasn't heard From him." On the June 21, 2016 form, the job coach wrote, "[Hoeft] miss work on 6/-20-16 because he was in jail for no reason and got out 6/21/16 and claims that he has problems with Burton police for a long time."

When viewed in the light most favorable to the non-moving party, we conclude that the job-coach's note contains a factual dispute: Hoeft reported being jailed and his mother reported that he was fishing. That discrepancy, coupled with the fact that a jury could reasonably infer that Hoeft was simply making excuses for missing work, is a fact question that precludes granting summary disposition under MCR 2.116(C)(10). In addition, Hoeft stated in his 2017 deposition that he has never spent a night in jail. Further, Hoeft's mother testified although she knew of "one time" that Hoeft was arrested it happened "at least two years ago." Therefore, to the extent that the court found no question of fact relating to the alleged June 2016 fraud, the trial court erred because it did not properly view the evidence in the light most favorable to Hoeft and his mother.

Next, the alleged October/November 2016 fraud is based on the submission of attendant-care forms showing that Hoeft's mother and stepfather provided him with daily 24-hour attendant care on October 14, October 22, October 25, October 26, and November 3, 2016. Progressive relies on a surveillance report, which indicates that Hoeft was not observed at all during the 5-day period, but Hoeft's mother and stepfather were both observed outside Hoeft's presence. The surveillance report included blurry photographs taken from a distance and amateurish, unsteady video recordings supposedly depicting Hoeft's mother doing a number of chores outside of the home, including cutting grass, picking up her mail, and running short errands. In addition, the photographs allegedly showed Hoeft's stepfather outside the home, including running errands with Hoeft's mother. The investigator concluded, based on his five-day observation period that, despite

never seeing Hoeft, he could verify that Hoeft did not live at 3521 Fern Avenue (the address Hoeft represented to the insurance company that he lived at).

Hoeft's mother, although not directly confronted with the surveillance report, testified that when she provides attendant care she is not always in the same exact room at Hoeft. Instead, she would sometimes be outside while he was inside and vice versa. She also noted that at times Hoeft would be with his sister for 20 minutes, but she would not subtract that from the attendant-care form. She also testified that if Hoeft called her from work, she would not add the phone conversation time to the claimed attendant-care time. She testified that the attendant-care forms are accurate "[a]s far as [she] knows," and the attendant-care forms specifically state that they are "true and complete to the best of my knowledge." Finally, rather than claiming a straight 24 hours for each day, the attendant care forms submitted for the challenged October/November 2016 dates indicate times when Hoeft's mother was providing care and times when Hoeft's stepfather was providing care.

Viewing the above in the light most favorable to the non-moving party, a reasonable jury could determine that Hoeft's mother was attempting to accurately account for the time she spent providing attendant care and the time that Hoeft's stepfather provided attendant care. At times, she provided that care when Hoeft was outside her presence—such as when he called her while she was at work—but she would not include that time on the attendant-care forms. At times, she allowed others—including Hoeft's sister—to care for him for short periods of time, but she did not subtract that time from the time she represented that she provided attendant care to Hoeft. Taken together, if a jury found credible the investigator's contention that Hoeft's mother and stepfather were outside his presence at times in October/November 2016, the jury could also find credible Hoeft's mother's testimony that she believed the forms were accurate. A jury could also determine that, although the attendant-care forms contained discrepancies, when Hoeft's mother completed them she did so based on her belief that the forms were accurate and so she did not intend to defraud Progressive.

Finally, Progressive maintains that Hoeft and his mother fraudulently claimed that Hoeft received daily 24-hour attendant care on August 25, August 26, August 27, and September 2, 2017. Progressive relied upon a surveillance report. In the report, the investigators determined that, based on their surveillance and a records search, Hoeft was living with a girlfriend, not with his mother or stepfather. They recorded an individual that they found matched Hoeft's description assisting a woman with moving items, including a mini-refrigerator from one residence to another. They recorded that individual driving and they concluded that the individual stayed overnight at a home without the presence of either Hoeft's mother or stepfather. We agree that the August/September 2017 surveillance allows for a strong inference of fraud. It is hard to imagine how Hoeft's mother and stepfather were able to claim to have provided 24-hour attendant care on days when Hoeft is apparently driving around by himself and spending time at what the investigator determined was his girlfriend's residence.

Yet, at the same time, it is evident that the investigator made a factual determination that the individual that was being surveilled was Hoeft. The trial court relied on that factual determination by the investigator and used it to find Hoeft committed fraud. Hoeft, however, testified that he did not drive and did not have a driver's license. If the jury chose to credit Hoeft's testimony, and if it did not find credible the investigator's determination that the individual

depicted driving the vehicle was, in fact, Hoeft, then the surveillance report for August/September 2017, like the report for October/November 2016, merely shows that his caregivers are occasionally outside his presence. Because it is inappropriate to make credibility determinations when reviewing a motion for summary disposition under MCR 2.116(C)(10), we conclude that the trial court erred by finding that Hoeft and his mother made a fraudulent statement in connection with the challenged August/September 2017 dates. Surveillance can show uncontroverted fraud. It does not always do so. In this case, viewing the evidence in the light most favorable to the non-moving party, the surveillance records are insufficient to establish clear evidence of fraud *and* the absence of a disputed question of material fact.[4]

Reversed and remanded for further proceedings. Hoeft and McCoy, as the prevailing parties, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[4] The *Bahri* court stated that "[r]easonable minds could not differ in light of this clear evidence that plaintiff made fraudulent representations for purposes of recovering PIP benefits." *Bahri*, 308 Mich App at 426. This statement, however, was not intended to indicate that if there was clear evidence that a plaintiff made fraudulent representations that a court, in spite of a genuine issue of material fact, may grant summary disposition. The *Bahri* Court relied on both the clear evidence *and* the lack of a genuine issue of material fact. Both are required before this Court may affirm a grant of summary disposition on the basis of a plaintiff's fraud in connection with a PIP claim.